Supreme Court, U.S.
FILED

01136 5 MAR 14 2002

OFFICE OF THE CLERK

No. ____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2001

WILLIAM DANKS

Petitioner,

vs.

CLAUDE APPEL AND ROBERT HAEGER

Respondents

Petition for a Writ of Certiorari to the Presiding Disciplinary Judge of the Colorado Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

ALFRED T. MCDONNELL
Counsel of Record
ANDREW S. KELLEY
ARNOLD & PORTER
Suite 4500
370 Seventeenth Street
Denver, Colorado 80204
(303) 863-1000

Counsel for Petitioner

33P

QUESTION PRESENTED

Whether the First Amendment's prohibition on prior restraints requires the vacating of an order prohibiting all disclosure of certain subpoenaed documents, where that order was entered against a person who did not initiate the subpoena, who was not a party to the proceeding in which the documents were subpoenaed, and who was provided the documents without any restriction on their use.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Office of Attorney Regulation Counsel of the Colorado Supreme Court was a party to the proceedings before the Presiding Disciplinary Judge.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

INTRODUCTORY STATEMENT 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

The PDJ's Order Constitutes an Unconstitutional Prior Restraint on Petitioner's Speech 5

The PDJ's Protective Order Constitutes an Unprecedented and Unprincipled Expansion of *Seattle Times v. Rhinehart* 8

The PDJ's Order Conflicts with a Long Line of Cases Holding that Courts May Not Recall Information from the Public Domain. 10

CONCLUSION 12

APPENDIX

Appendix A – Protective Order Issued By the Presiding Disciplinary Judge 1a

Appendix B – Order of the Colorado Supreme Court Denying Danks' Petition for Discretionary Review of the PDJ's Order 11a

Appendix C – Order of the Colorado Supreme Court Denying Danks' Petition for Reconsideration or to Intervene in the ORC's Petition for Discretionary Review 13a

TABLE OF AUTHORITIES

CASES

Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 380 (1968) 1

Butterworth v. Smith, 494 U.S. 624 (1990)..... 6, 10

CBS Inc. v. Davis, 510 U.S. 1315 (Blackmun, Circuit Justice 1994) 6

In re Charlotte Observer, 921 F.2d 47 (4th Cir. 1990)..... 10

In re Green, 11 P.3d 1078 (Colo. 2000) 7

Landmark Communications Inc. v. Virginia, 435 U.S. 829 (1978)..... 6

Metro. Opera Ass'n v. Local 100, 239 F.3d 172 (2d Cir. 2001)..... 7

Near v. Minnesota, 283 U.S. 697 (1931) 6, 7

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)..... 6

New York Times v. Sullivan, 376 U.S. 254 (1964)..... 7

New York Times v. United States, 403 U.S. 713 (1971)..... 6

Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam)..... 10

Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996) 5, 6, 10

Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)..... 3, 8, 9

Smith v. Daily Mail Publ'g Co.,
443 U.S. 97 (1979) 10

Star-Telegram, Inc. v. Walker, 834 S.W.2d 54
(Tex. 1992) 10

STATUTE

28 U.S.C. § 1257(a) 1

William Danks respectfully petitions for a writ of certiorari to review the order of the Presiding Disciplinary Judge of the Colorado Supreme Court in this case.

OPINIONS BELOW

The order and opinion of the Presiding Disciplinary Judge (App., *infra*, 1a) is unreported. The order of the Colorado Supreme Court denying Mr. Danks' petition for discretionary review (App., *infra*, 11a) is unreported, as is Mr. Danks' motion for reconsideration and to intervene in a petition for discretionary review by the Office Attorney Regulation Counsel (App., *infra*, 13a).

JURISDICTION

The Colorado Supreme Court denied Mr. Danks' petition for discretionary review on December 21, 2001 (App., *infra*, 11a), and denied a request for reconsideration of its denial. (App., *infra*, 13a). Colorado law does not provide any opportunity for review of the order at issue other than the (already twice denied) discretionary review by the Colorado Supreme Court. There is, therefore, no further opportunity for Mr. Danks to be heard on the matters raised in this Petition. Moreover, the order at issue in this case has no expiration date, and there is no indication that modification will be forthcoming. (App., *infra*, 9a). Thus, this case is final for purposes of establishing this Court's jurisdiction. *See Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 380, 312-13 n.5 (1968).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

INTRODUCTORY STATEMENT

For more than 125 days, Petitioner Danks has been silenced by order of a disciplinary officer of the Colorado Supreme Court. He has twice sought relief from the Colorado Supreme Court which has twice denied all relief without comment, in both instances within hours of the

filing of the request for relief.[1] Review by this Court is Mr. Danks' only hope for lifting the prior restraint which by its terms may otherwise remain in effect indefinitely.

The Court should grant a writ of certiorari to review the order of the Presiding Disciplinary Judge below for three reasons. First, the PDJ's order creates a prior restraint on Mr. Danks' speech, contrary to the First and Fourteenth Amendments and the decisions of this Court. Second, the PDJ's order effects a dramatic and unprincipled expansion of *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). Third, the PDJ's ruling conflicts with the long line of authority (including several cases by this Court) which hold that courts may not withdraw information from the public domain.

STATEMENT OF THE CASE

This case involves the legality of a prior restraint on Petitioner Danks' speech, and raises important questions about the scope of this Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The court below held that *Seattle Times* permits a "protective order" on materials obtained by subpoena, even when: (1) the person enjoined did not subpoena the documents in question; (2) the person enjoined was not a party to the proceeding; and (3) the person subject to the protective order held the materials free of any restriction on their use prior to the entry of the protective order.

---

[1] Mr. Danks' first petition was denied on the second day following its filing. His petition for reconsideration was denied on the third working day following its filing.

In order to place this dispute in context, a brief history of the litigation follows: In March 2001, Colorado's Office of Attorney Regulation Counsel ("ORC") began an investigation of Petitioner William Danks, a Colorado attorney.[2] The investigation involved, *inter alia*, allegations that Petitioner Danks accused two sitting state court judges, Claude Appel and Robert Haeger, of serious misconduct. During the course of the investigation, ORC subpoenaed investigatory files from the FBI that contained information on the FBI's criminal investigation of Appel and Haeger. ORC sent Mr. Danks a copy of the FBI documents. Notably, ORC did *not* place any restriction on Mr. Danks' use of the documents.[3] Moreover, ORC did not subpoena the documents on behalf of Mr. Danks; rather; Mr. Danks learned of the subpoena only after it was issued.

Shortly after receiving the documents, Mr. Danks transmitted them to third parties, principally state officials, believing that the files suggested serious wrongdoing by Appel and Haeger (some of which occurred while the judges were acting in their judicial capacity).

Approximately two weeks *after* Mr. Danks received the documents (and after Mr. Danks had already transmitted the documents to the third parties), Appel and Haeger sought a protective order prohibiting Mr. Danks from further disseminating the FBI documents to anyone.

---

[2] To date, this investigation has not proceeded beyond the investigatory stage.

[3] The body of the transmittal letter contained only one sentence: "Enclosed please find copies of the documents I received pursuant to the subpoena served on the FBI."

The Presiding Disciplinary Judge,[4] ("PDJ") charged with hearing such motions entered an interim protective order on October 20, 2001. After receiving briefs and hearing argument, the PDJ entered a permanent protective order on December 18, 2001, *nunc pro tunc*, November 27. The order prohibits Mr. Danks (and apparently everyone else) from disclosing "the FBI documents and the information contained therein . . . to any other person or entity without further Order of this Court." (App. *infra*, 9a). On December 21, 2001, the Colorado Supreme Court summarily and without explanation denied Mr. Danks' petition for discretionary review of the PDJ's order. On January 9, 2002, the Colorado Supreme Court denied Mr. Danks' motion for reconsideration, again without explanation, and on the same day, the court summarily denied Mr. Danks' motion to intervene in the ORC's petition for discretionary review of the same order of the PDJ.[5]

REASONS FOR GRANTING THE WRIT

The PDJ's Order Constitutes an Unconstitutional Prior Restraint on Petitioner's Speech

The PDJ's order creates an unconstitutional prior restraint on speech. Court injunctions against future speech – like the one at issue in this case – are paradigm prior restraints. *See, e.g.*, *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996). Indeed, in the

---

[4] The Presiding Disciplinary Judge, an adjunct of the Colorado Supreme Court, is involved in various aspects of the Colorado attorney discipline process.

[5] The Colorado Supreme Court has not yet ruled on the ORC's petition for discretionary review.

proceedings below, respondents agreed that they sought a prior restraint against Mr. Danks' speech (albeit, in their view, a permissible one). Of course, "*prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.*" *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (emphasis added), and this Court has never upheld any restriction deemed a prior restraint. *See, e.g., Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times v. United States*, 403 U.S. 713 (1971); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *see Procter & Gamble Co.*, 78 F.3d at 227 (stating that the Supreme Court has never upheld a prior restraint).

Even when questions of national security or competing constitutional rights are at stake, the "most extraordinary remedy" of prior restraint is justified "only where the evil that would result from the reportage is both great and certain and cannot be militated [sic] by less intrusive measures." *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (Blackmun, Circuit Justice 1994) (summarizing the Supreme Court's prior restraint jurisprudence).

Here, the "evil" from disclosing the FBI documents is neither "great" nor "certain." It is clear that there is no sufficiently strong government interest to counterbalance infringement of Mr. Danks' First Amendment rights, particularly since the subject of Mr. Danks' speech – alleged governmental misconduct – lies at the core of the First Amendment. *See, e.g., Butterworth v. Smith*, 494 U.S. 624, 632 (1990); *Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (stating that communication about judicial misconduct lies at the core of the First Amendment).

Moreover, any harm is uncertain because the judges would suffer a legally cognizable injury only if the

allegations in the FBI papers are demonstrably false and published with "actual malice."[6] Finally, it is likely that no harm is prevented at all, since Mr. Danks possesses evidence of serious wrongdoing by the judges independent of the FBI files.[7] Since Mr. Danks has already published both the FBI papers and the information gained from another source, and may publish the information gained from another source again independently of the disciplinary proceeding, a prior restraint would prevent little or no "harm" to the judges' reputations.[8]

Notwithstanding the near *per se* invalidity of prior restraints, the PDJ gave only cursory analysis to the First Amendment issues presented by his order. His First Amendment analysis, *in toto*, consisted of a statement that *Seattle Times* controlled the case, since "but for" the use of

---

[6] "Actual malice" in this context means that the speaker published the statement with knowledge that it was false or with reckless disregard of whether it was false or not. *See New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). *See generally In re Green*, 11 P.3d 1078, 1083 (Colo. 2000) (applying *Times v. Sullivan* to attorney discipline cases).

[7] Even if enjoining publication of the FBI files could prevent future harm, First Amendment concerns compel courts to deal with such harm via post-publication defamation actions, rather than pre-publication prior restraints. *See, e.g., Near v. Minnesota*, 283 U.S. 697, 720 (1931) ("[s]ubsequent punishment for such abuses as may exist is the appropriate remedy [for abuse of the liberty of the press], consistent with constitutional privilege"); *Metro. Opera Ass'n v. Local 100*, 239 F.3d 172, 177 (2d Cir. 2001) (stating that "courts have long held that equity will not enjoin a libel" and collecting cases).

[8] Mr. Danks published this information prior to the entry of the PDJ's first order.

discovery by the ORC, Mr. Danks (who was not a party to the case) would not have access to the documents.

The PDJ's Protective Order Constitutes an Unprecedented and Unprincipled Expansion of *Seattle Times v. Rhinehart.*

The PDJ effected a dramatic and unprincipled expansion of *Seattle Times* in three ways: First, he issued a *Seattle Times* protective order governing documents in which Mr. Danks possessed pre-existing First Amendment rights. Second, he applied *Seattle Times* to Mr. Danks even though the PDJ found that Mr. Danks was *not* a party to the proceeding in which the ORC obtained discovery. The PDJ ruled that it was appropriate to apply *Seattle Times* to Mr. Danks, because "but for" discovery by the ORC, Mr. Danks would not have obtained the documents. Finally, the PDJ disregarded the "abuse of discovery" underpinning of *Seattle Times* by applying the case to Mr. Danks, who did not employ discovery and therefore could not have abused it.

The PDJ disregarded the primary limitation on *Seattle Times*, namely that parties to a lawsuit do not have a First Amendment right to discover information from their opponents. *See* 467 U.S. at 32. It follows from this principle that it does not offend the First Amendment to restrict a party's access to discovery materials as a *quid pro quo* for access, since the party has no right to access the materials at all. *See id.* In the instant case, Mr. Danks had already obtained the FBI records (and indeed, had already published them) when Appel and Haeger sought a protective order. Thus, instead of exercising "continuing court control" over Mr. Danks' access to the documents, and imposing a limitation on publication as a *quid pro quo*

for access to information, *see id*, the PDJ placed an *ex post facto* restriction on what Mr. Danks could do with materials already innocently in his possession – materials in which Mr. Danks already had First Amendment rights.

Second, the PDJ dramatically expanded *Seattle Times* by holding that it applies to Mr. Danks, even though he found that Mr. Danks *was not* a party to the proceeding in which the ORC obtained discovery (App., *infra*, 3a). The PDJ held that *Seattle Times* properly applied to Mr. Danks even though he was not a party, because but for the subpoena by the ORC, Mr. Danks would not have obtained the documents at issue.

The PDJ's "but for" causation test dramatically expands *Seattle Times*, since it would justify the application of that case to *anyone* who comes into possession of documents originally obtained via discovery, no matter how far removed from the suit. For example, the PDJ's reading of *Seattle Times* would authorize a restriction on The New York Times or the Denver Post if they were to receive the FBI records from someone two or three persons removed from Mr. Danks. Clearly *Seattle Times* did not contemplate such a result.

Finally, the PDJ disregarded the "abuse of discovery" rationale for *Seattle Times* in holding that *Seattle Times* authorized a protective order against Mr. Danks. *Seattle Times* found that the protective order in that case was justified by the substantial government interest in preventing abuse of discovery. *See* 467 U.S. at 34-36. However, since Mr. Danks did not employ discovery (and indeed was not even a party to the proceeding), there is no way that he could abuse it. Thus, the PDJ improperly relied on this justification in enjoining Mr. Danks' speech.

The PDJ's Order Conflicts with a Long Line of Cases Holding that Courts May Not Recall Information from the Public Domain.

There is a long line of authority holding that courts may not withdraw information from the public domain, even if that information is inadvertently or improperly released. This Court's opinion in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 311-12 (1977) (per curiam), provides an excellent example of this principle. *Oklahoma Publishing* held that where a petitioner obtained information lawfully and with the state's implicit approval, a restraint on publication of the information so obtained constituted an impermissible prior restraint, even though the law provided that the information in question should remain confidential. *See id. Oklahoma Publishing*, with obvious parallels to the instant case, is not alone. There is a plethora of authority vindicating the same principle. *See, e.g., Procter & Gamble Co.*, 78 F.3d at 225 (prior restraint not justified on publication of lawfully obtained documents, even though those documents were under seal when obtained); *In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990) (injunction against revealing name of target of grand jury investigation, issued immediately after the name was inadvertently revealed in open court, is unconstitutional); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) ("[t]he law cannot recall information once it is in the public domain"); *see also, Butterworth*, 494 U.S. at 632 (First Amendment bars penalties for publication of lawfully obtained information); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) (same).

The PDJ's ruling – which essentially recalled information from the public domain – improperly disregards this authority. The Supreme Court should grant the writ to vindicate the First Amendment principle that

Courts may not withdraw information from the public domain, and to resolve the conflict between the PDJ's ruling and the numerous cases cited above.

CONCLUSION

For the reasons stated above, Petitioner William Danks asks that this Court grant his petition for a writ of certiorari to review the order of the Presiding Disciplinary Judge in this matter.

Respectfully Submitted,

ALFRED T. MCDONNELL
Counsel of Record
ANDREW S. KELLEY
ARNOLD & PORTER
Suite 4500
370 Seventeenth Street
Denver, Colorado 80202
(303) 863-1000

Counsel for Petitioner

APPENDIX A – PROTECTIVE ORDER ISSUED BY THE PRESIDING DISCIPLINARY JUDGE

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 600 17TH STREET, SUITE 510-S DENVER, COLORADO 80202	COURT USE ONLY Case Number: 01PDJ098
In the Matter of the Requests for Investigation of William Charles Danks, filed by Bernie Fay (01-01375) and Attorney Regulation Counsel (01-00964)	
PROTECTIVE ORDER	

This matter is before the Court on the "Petition for Protective Order Pursuant to C.R.C.P. 251.31(e)" filed by Claude W. Appel on October 26, 2001. Filed under seal with the Petition was a copy of an investigative file produced by the Federal Bureau of Investigation ("FBI") pursuant to a subpoena issued by Attorney Regulation Counsel under C.R.C.P. 251.10 (the "FBI Documents"). On October 26, 2001, Petitioner Robert E. Haeger filed a "Joinder in Petition for Protective Order Pursuant to

C.R.C.P. 251.31(e)." (The Petition filed by Claude W. Appel and the Joinder in the Petition filed by Robert E. Haeger are collectively referred to as the "Petition"). On October 29, 2001, in response to the Petition, William C. Danks ("Danks") filed a "Petition for Issuance of Subpoenas and Brief of William C. Danks." Also on October 29, 2001, the Office of Attorney Regulation Counsel filed a response to the Petition.

The Court held a status conference on the Petition and the Responses on October 30, 2001 and directed the parties to file simultaneous briefs in support of their positions. On October 30, 2001, the Court entered a written "Order Re: Interim Protective Order Pursuant to C.R.C.P. 251.10" ("Interim Order"). Briefs were filed by the parties on November 20, 2001. On November 21, 2001, Petitioners and Danks filed Reply Briefs.

A hearing was held on the Petition and the Responses on November 27, 2001. Petitioner Appel was represented by Michael H. Berger. Petitioner Haeger was represented by Jeffrey A. Chase. William C. Danks was present at the hearing and was represented by Alfred T. McDonnell. The Office of Attorney Regulation Counsel was represented at the hearing by Charles E. Mortimer, Jr., Assistant Attorney Regulation Counsel. Deputy Attorney Regulation Counsel Nancy L. Cohen was present during a portion of the hearing.

Upon consideration of the Petition, the FBI Documents, the Responses, the Briefs submitted by the Parties and arguments of counsel, the Court finds and concludes as follows:

1. The Court has jurisdiction over the parties to the Petition and the Responses and the subject matter of

this proceeding pursuant to C.R.C.P. 251.31(e). That Rule provides:

> To protect the interests of a complainant, witness, third party, or respondent, the Presiding Disciplinary Judge or a Hearing Board, may, upon application of any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application.

2. The Subpoena issued by the Office of Attorney Regulation Counsel to the FBI ("Investigative Subpoena") was an investigative subpoena, issued pursuant to C.R.C.P. 251.10. While that rule makes reference to C.R.C.P. 45, C. R. C. P. 251.10 is the controlling rule with respect to the rights and obligations of Attorney Regulation Counsel with respect to the documents produced pursuant to the Investigative Subpoena.

3. The FBI Documents were produced by the FBI pursuant to the Investigative Subpoena.

4. Danks was not a party to any proceeding with respect to the issuance of the Investigative Subpoena and C.R.C.P. 251.10 did not authorize or require Attorney Regulation Counsel to provide to Danks any confidential documents obtained pursuant to the Investigative Subpoena.

5. The FBI Documents, when obtained by Attorney Regulation Counsel from the FBI, were "confidential" within the meaning of C.R.C.P. 251.31 (a) and therefore, Attorney Regulation Counsel had no authority or authorization to provide the documents to Danks or anyone else.[1] The Court rejects the position asserted by Attorney Regulation Counsel that it had the unfettered discretion to determine when something is confidential and when it is not. Such a position is contrary to the provisions of C.R.C.P. 251.31(a), (b), (c) and (d). The investigations of Danks are confidential proceedings pursuant to 251.31(a) unless and until a formal complaint is

---

[1] [This footnote is supplied by Petitioner: CRCP 251.31(a), titled "Availability of Information," provides that:

> Except as otherwise provided by these rules, all records, except the work product, deliberations and internal communications of Regulation Counsel, the committee, the Presiding Disciplinary Judge, the Hearing Boards, and the Supreme Court shall be available to the public after the committee determines that reasonable cause to believe grounds for discipline exists and the Regulation Counsel files and serves a complaint as provided in C.R.C.P. 251.14, unless the complainant or the respondent obtains a protective order.
>
> Unless otherwise ordered by the Supreme Court or the Presiding Disciplinary Judge, nothing in these rules shall prohibit the complaining witness, the attorney, or any other witness from disclosing the existence of proceedings under these rules or from disclosing any documents or correspondence served on or provided to those persons.]

filed against and served upon Danks pursuant to C.R.C.P. 251.14.

6. Danks received the documents as the result of an investigative subpoena issued by Attorney Regulation Counsel to the FBI, the production of the documents pursuant to that subpoena, and the subsequent transmittal of a complete copy set of the documents to Danks by Attorney Regulation Counsel under either an agreement to do so between Attorney Regulation Counsel and Danks or under a misapprehension by Attorney Regulation Counsel that it was required and/or authorized to do so.

7. The FBI Documents were obtained by Danks solely through the discovery processes authorized by C.R.C.P. 251. There is no evidence or claim by Danks that Danks obtained the FBI Documents other than through the Investigative Subpoena issued by Attorney Regulation Counsel. Danks has never requested or obtained the FBI Documents under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (West 2001), the Federal Privacy Act, 5 U.S.C. § 552a (West 2001), or under any other federal or state law.

8. In addition to (and independent from) the confidentiality that attaches to the FBI Documents under C.R.C.P. 251.31(a), the FBI Documents are confidential within the meaning of C.R.C.P. 251.31(e) by virtue of federal law. The Court takes judicial notice that a person cannot simply walk into an FBI office and ask to see any or all of the FBI's investigative files and records. Such records are not public records or generally available to the public. Those documents are treated as confidential by the FBI.

9. There was no waiver of the federal confidentiality of the FBI Documents when the FBI

Documents were produced to Attorney Regulation Counsel. First, because there has been no formal request under either the Privacy Act or FOIA, there is no evidence that any federal agency has been afforded any opportunity to review the questioned documents for confidentiality or privilege. Second, the right of confidentiality that arises under FOIA and the Privacy Act were federal statutory rights of the Petitioners as well as the numerous other persons named in the FBI Documents. As a result, the FBI could not and did not cause a waiver of Petitioners' rights to privacy and confidentiality with respect to the FBI Documents.

10. The Court further concludes that a state officer (Attorney Regulation Counsel) cannot waive confidentiality protections granted to citizens by federal law. Therefore, the fact that Attorney Regulation Counsel provided the FBI Documents to Danks does not constitute a waiver of the right of confidentiality belonging to the Petitioners and other persons named in the FBI Documents.

11. The Court does not believe it is required, as part of this proceeding, to make a finding under section 552 (b) (7) (C) of the Freedom of Information Act with respect to whether the disclosure of the FBI Documents "could reasonably be expected to constitute an unwarranted invasion of personal privacy" with respect to the Petitioners and the other persons named in the FBI Documents. However, if such a finding were required as a predicate to the issuance of a protective order in this case, the Court would find that there is a reasonable probability that the disclosure of the FBI Documents "could reasonably be expected to constitute an unwarranted invasion of the personal privacy" rights of Petitioners and the other persons named in the FBI Documents. The Court specifically notes that the FBI and the United States Attorney for the District of Colorado reviewed the FBI Documents and determined that there was no evidence of any wrongdoing. Courts

invariably hold under section 552(b)(7)(C) of FOIA that where there is a finding of no misconduct, that investigative materials relating to the investigation will not be disclosed because that will cause unwarranted invasion of personal privacy rights of the subjects of or persons named in the investigative materials. *Stern v. Federal Bureau of Investigation*, 737 F.2d 84, 89 (D.C. Cir. 1984); *Hunt v. Federal Bureau of Investigation*, 972 F.2d 286, 287 (9th Cir. 1992); *Sherman v. United States Department of the Army*, 244 F.3d 357 (5th Cir. 2001) and *Mueller v. United States Department of the Air Force*, 63 F.Supp.2d 738 (E.D. Va. 1999).

12. The Court rejects Danks' argument that because Danks has already disseminated the FBI Documents to a variety of third persons prior to the issuance of the Interim Protective Order that such actions preclude the issuance of a Protective Order or prospective relief. The Court finds that further dissemination of the FBI Documents by Danks would be wrongful and would cause further harm to the Petitioners and the other persons named in the FBI Documents. Although the Court has no power in the context of this Petition for Protective Order to remedy any harm already caused by Danks' dissemination of the FBI Documents, C.R.C.P. 251.31(e) specifically grants power to the Court to prevent further harm as a result of further dissemination. *See Rugiero v. United States Department of Justice*, 257 P.3d 534 (6th Cir. 2001).

13. Good cause has been shown for the issuance of a Protective Order pursuant to C.R.C.P. 251.31(e). The continued dissemination by Danks of documents which were provided to him by Attorney Regulation Counsel and which are confidential under both state and federal law, poses a significant and substantial risk of harm to the Petitioners, the other persons named in the FBI Documents, the judicial system and the system of justice as a whole.

There is no justifiable reason that the investigation of alleged misconduct by a single lawyer – Danks – should subject the multitude of persons named (as many as 100 persons) in the FBI Documents to public humiliation and ridicule, particularly when the agencies authorized by law to investigate and prosecute violations of federal law have determined that no such violations had occurred. Therefore, good cause exists for the entry of a protective order.

14. A protective order is necessary to protect the interests of Petitioners Appel and Haeger and is also necessary to protect the interests of the judicial system, and all the people whose identities are disclosed in the FBI Documents.

15. The Court rejects Danks' argument that the First Amendment to the United States Constitution and Article II, Section 10 of the Colorado Constitution prohibit the issuance of a protective order in this case. The United States Supreme Court case of *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and the Colorado Supreme Court case of *Bowlen v. District Court*, 733 P.2d 1179 (Colo. 1987), are controlling on this issue. In *Seattle Times Co.*, the United States Supreme Court held that "where . . . a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict dissemination of the information if gained from other sources, it does not offend the First Amendment." 467 U.S. at 20. The FBI Documents were obtained by Danks solely through the discovery processes authorized by C.R.C.P. 251. The Court has a substantial and compelling interest in controlling the discovery process and preventing "abuse of its process," 467 U.S. at 35. This Court's determination of whether good cause exists for the issuance of a Protective Order provides whatever protections the First Amendment

requires and the issuance of this Protective Order does not constitute an unconstitutional prior restraint.

Upon the foregoing, IT IS ORDERED:

1. The FBI Documents and the information contained therein are confidential within the meaning of C. R. C. P. 251.31(a) and federal law and shall not be further disclosed by Danks, Attorney Regulation Counsel or any other party to this proceeding to any other person or entity without further Order of this Court. The documents in question remain confidential under C.R.C.P. 251.10.

2. This Protective Order expires automatically upon the occurrence of any of the following events:

a. The admission into evidence of the FBI Documents in a public proceeding before this Court, unless this Court enters a further protective order.

b. The admission into evidence of the FBI Documents in any other court or public proceeding provided that the FBI Documents so offered were obtained independently from the production of the documents by the FBI pursuant to the Investigative Subpoena issued by Attorney Regulation Counsel.

3. This Protective Order does not prevent any person acquiring the same information which is contained within the questioned documents from another,

independent source from disclosing such independently obtained information.[2]

4. This Protective Order replaces the Order Re: Interim Protective Order Pursuant to C.R.C.P. 251.10 issued October 30, 2001.

DATED THIS 18th DAY OF DECEMBER, 2001, *nunc pro tunc*, November 27, 2001.

BY THE COURT

Roger L. Keithley,
Presiding Disciplinary Judge

---

[2] It has been represented to the PDJ that Danks has filed copies of all or portions of the questioned documents in various courts. Information which is derived from the questioned documents, whether the original set provided to Danks or copies thereof even though previously filed with other courts, falls within the proscriptions of this protective order.

Appendix B

APPENDIX B – ORDER OF THE COLORADO SUPREME COURT DENYING DANKS' PETITION FOR DISCRETIONARY REVIEW OF THE PDJ'S ORDER.

SUPREME COURT, STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203 ORIGINAL PROCEEDING IN DISCIPLINE Petition Pursuant to C.A.R. 21	CASE NO. 01SA404
IN RE: In the Matter of the Requests for Investigation of William Charles Danks, filed by Bernie Fay (01-01375) and Attorney Regulation Counsel (01-00964)	
ORDER OF THE COURT	

Upon consideration of the Motion to Seal "Petition Pursuant to C.A.R. 21 for Order to Show Cause Why Order Imposing Prior Restraint on Speech Should Not Be Vacated Forthwith" filed in the above entitled action and matter, and being sufficiently advised in the premises,

Appendix B

IT IS THIS DAY ORDERED that Said Motion to Seal is DENIED and the Petition Pursuant to C.A.R. 21 is DENIED.

BY THE COURT, EN BANC, December 21, 2001
(Mullarkey C.J. and Martinez, J. Not Participating)

Appendix C

APPENDIX C – ORDER OF THE COLORADO SUPREME COURT DENYING DANKS' PETITION for RECONSIDERATION OR TO INTERVENE IN THE ORC'S PETITION FOR DISCRETIONARY REVIEW

SUPREME COURT, STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203 ORIGINAL PROCEEDING IN DISCIPLINE Petition Pursuant to C.A.R. 21	CASE NO. 01SA404
IN RE: In the Matter of the Requests for Investigation of William Charles Danks, filed by Bernie Fay (01-01375) and Attorney Regulation Counsel (01-00964)	
ORDER OF THE COURT	

Upon consideration of the Petition for Reconsideration and the Motion For Leave to Intervene in Support of the Office of Attorney Regulation Counsel's Petition Pursuant to C.A.R. 21 and C.R.C.P. 251.1(d) Or, in the Alternative, to File a Cross Petition Seeking Identical

Appendix C

Relief filed in the above entitled action and matter, and being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that Said Petition for Reconsideration and Said Motion for Leave to Intervene or To File a Cross Petition, shall be and the same hereby are DENIED.

BY THE COURT, January 9, 2002

Supreme Court, U.S.
FILED
MAR 27 2002

(2)

No. 01-1365

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2001

WILLIAM DANKS

Petitioner,

vs.

CLAUDE APPEL AND ROBERT HAEGER

Respondents.

PETITIONER'S SUPPLEMENT TO HIS PETITION FOR CERTIORARI

ALFRED T. MCDONNELL
Counsel of Record
ANDREW S. KELLEY
ARNOLD & PORTER
Suite 4500
370 Seventeenth Street
Denver, Colorado 80202
(303) 863-1000

Counsel for Petitioner

MP

INTRODUCTION

Pursuant to Rule 15.8 of the Court's Rules, Petitioner William Danks submits this supplement to his petition for certiorari to call attention to an Order of the Colorado Supreme Court entered March 12, 2002 (App., *infra.*, 1a), and an Order of the Colorado Supreme Court entered March 18, 2002, which clarifies the March 12 order (App., *infra.*, 3a). Counsel received these materials from the state court after filing the instant petition for certiorari.

In the March 12 order, the Colorado Supreme Court *sua sponte* reconsidered an earlier order denying Mr. Danks' petition to intervene in a petition for discretionary review filed by the Office of Attorney Regulation Counsel ("ORC"). (The court had previously denied the same petition on January 9, 2002.) The ORC's petition seeks discretionary review of the same order that is at issue in Petitioner Danks' petition for certiorari, albeit on different grounds.

Significantly however, the Colorado Supreme Court did not grant Danks' petition for discretionary review to that court, nor Danks' petition to reconsider the Court's denial of his petition for discretionary review. Thus, the Colorado Supreme Court did not grant Danks' attempt to appeal the order at issue in this case, but rather granted Danks the opportunity to intervene in another party's request for discretionary review of the same order.

The March 18 order clarifies the March 12 order, stating that the March 12 order did not lift the order that Danks complains of in his petition for certiorari here.

I. THE RECENT COLORADO SUPREME COURT ORDERS DO NOT AFFECT THE FINALITY OF DANKS' CASE

The recent Colorado Supreme Court orders do not affect the finality of Danks' case because those orders did not "reopen" his case, but rather allow Danks to intervene in a petition for review by another party to the PDJ's order. The Colorado Supreme Court has already denied Danks' petition for discretionary review, denied Danks' petition to reconsider the denial of his petition for discretionary review, and denied Danks motion to file a cross petition to the ORC's petition. What is more, the March 18 order makes clear that the prior restraint on Danks speech remains in place. Barring a *sua sponte* "re-reconsideration" of Danks' petition for review, his case is as final as it will ever be.[1]

The fact that the court below allowed Danks to file a brief in an appeal in a related case should not affect the finality of Danks' case. Such a holding would allow state courts to remove the Supreme Court's jurisdiction at any time merely by *sua sponte* reconsidering a previous denial of review. Moreover, holding that the order in this case is not final would allow the unconstitutional restraint on Danks' speech to remain in place even longer than the 148 days it has already silenced him. It would relegate him again to a state court that has twice denied his petition for relief before Danks could return to this Court to seek certiorari. While it is true that Danks *might* be able to collaterally attack the restraint on his speech by intervening in the ORC's petition, the mere possibility of future collateral attack should not render Danks' case non-final.

---

[1] Notably, Danks sought reconsideration of the Colorado Supreme Court's denial of his petition for discretionary review in the same pleading as his motion to intervene in the petition by the ORC. The Colorado Supreme Court, in its March 12 order, was careful to grant only the latter relief.

II. DANKS' CASE IS NOT MOOT

The recent orders of the Colorado Supreme Court do not render Danks' case moot because they do not remove the complained of restriction on Danks' speech. As of the date of filing this brief, Danks' speech has been restrained for 148 days, and the most recent order of the Colorado Supreme Court explicitly leaves the restraint in place. While it is true that the Colorado Supreme Court might remove the prior restraint on Danks' speech in the future, that possibility does not render Danks' case moot. This is particularly true when the Colorado Supreme Court declined to review the prior restraint on two occasions, and declined to remove it on a third.

III. IF DANKS' CASE IS NOT FINAL, THE COURT SHOULD HOLD THIS PETITION IN ABEYANCE UNTIL HIS CASE BECOMES FINAL

If the Court believes that in light of the recent Colorado Supreme Court decisions, Mr. Danks case is not final, Mr. Danks requests that this Court hold in abeyance any ruing on the Petition for Certiorari until the proceedings below are concluded.

Respectfully submitted,

ALFRED T. MCDONNELL
Counsel of Record
ANDREW S. KELLEY
ARNOLD & PORTER
Suite 4500
370 Seventeenth Street
Denver, Colorado 80202
(303) 863-1000
Counsel for Petitioner

APPENDIX A – ORDER OF THE COLORADO SUPREME COURT

SUPREME COURT, STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203 ORIGINAL PROCEEDING IN DISCIPLINE Petition Pursuant to C.A.R. 21	CASE NO. 01SA404
IN RE: In the Matter of the Requests for Investigation of William Charles Danks, filed by Bernie Fay (01-01375) and Attorney Regulation Counsel (01-00964)	
ORDER OF THE COURT	

Upon consideration of the Petition Pursuant to C.A.R. 21 and C.R.C.P. 251.1(d) filed herein by Attorney Regulation Counsel ("ARC"), and the Petition for Reconsideration and the Motion for Leave to Intervene in Support of the ARC's Petition Pursuant to C.A.R. 21 and C.R.C.P. 251.1(d) or, in the alternative, to file a Cross-Petition seeking Identical Relief filed by William Danks, and now being sufficiently advised in the premises,

IT IS ORDERED that upon reconsideration, Danks' Motion for Leave to Intervene is GRANTED.

IT IS FURTHER ORDERED that ARC's Petition Pursuant to C.A.R. 21 and C.R.C.P. 251.1(d) is GRANTED. Therefore,

IT IS ORDERED that:

(1) Mr. Danks may file a Brief in support of ARC's petition, or a cross-petition seeking identical relief on the grounds previously asserted in Mr. Danks' initial petition, on or before (20 days from the date of this order);

(2) that the Presiding Disciplinary Judge shall file an Answer to this Rule to Show Cause why the relief requested in ARC's and Mr. Dank's pleading should not be granted, on or before (40 days from the date of this order); and

(3) the ARC and Mr. Danks may file a Reply to the Presiding Disciplinary Judge's Answer on or before (55 days from the date of this order).

IT IS FURTHER ORDERED that pursuant to C.A.R. 21(g)(2) all proceedings below are stayed.

BY THE COURT, EN BANC, MARCH 12, 2002.

APPENDIX B – MARCH 18 ORDER CLARIFYING THE MARCH 12 ORDER

SUPREME COURT, STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203 ORIGINAL PROCEEDING IN DISCIPLINE Petition Pursuant to C.A.R. 21	CASE NO. 01SA404
IN RE: In the Matter of the Requests for Investigation of William Charles Danks, filed by Bernie Fay (01-01375) and Attorney Regulation Counsel (01-00964)	
ORDER OF THE COURT	

Upon consideration of Motions for Clarification of Order of Court and the Motions for Permission to Respond, filed by Claude Appel and Robert Haeger, and being sufficiently advised in the premises,

IT IS ORDERED that the order entered by the Presiding Disciplinary Judge on December 18, 2001 remains in effect, but that the underlying disciplinary proceedings against Mr. Danks are stayed pending further orders of this court.

IT IS FURTHER ORDERED that Judges Appel and Haeger may file Answer to the Rule to Show Cause.

BY THE COURT, MARCH 15, 2002

No. 01-1365

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2001

WILLIAM DANKS,

Petitioner,

vs.

CLAUDE APPEL and ROBERT HAEGER,

Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Ken Salazar
Attorney General
Alan J. Gilbert*
Solicitor General
Friedrick C. Haines
Assistant Attorney General
1525 Sherman Street, Fifth Floor
Denver, Colorado 80203
Telephone: (303) 866-5240
**Counsel of Record*

Attorneys for Respondents

May 13, 2002

QUESTIONS PRESENTED

1. Does this Court have jurisdiction on certiorari to review a case in which the same parties are before the Colorado Supreme Court on the same issues raised in the Petition for Writ of Certiorari, and in which the Colorado Supreme Court has not rendered a final judgment?

2. Is the First Amendment violated by a protective order prohibiting dissemination of documents and information contained in confidential FBI files, where the files have been obtained by the Colorado Office of Attorney Regulation Counsel pursuant to its subpoena power to investigate alleged attorney misconduct and produced to the attorney concerned in the context of preliminary discovery?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 8

I. THE COLORADO SUPREME COURT IS STILL CONSIDERING QUESTIONS ON WHICH PETITIONER SEEKS REVIEW ON CERTIORARI IN THIS COURT 8

II. THE PROTECTIVE ORDER IS SQUARELY WITHIN THE LIMITATION ON FIRST AMENDMENT RIGHTS RECOGNIZED BY *SEATTLE TIMES v. RHINEHART* 12

CONCLUSION 15

TABLE OF AUTHORITIES

PAGE

CASES

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 12, 13

Cruz, et al. v. Benine, et al., Case No. 96 CV 51 (Huerfano County District Court) 5

Jefferson v. City of Tarrant, Alabama, 522 U.S. 75 (1997) 13

Market Street Railway Co. v. Railroad Comm'n of California, 324 U.S. 548 (1945) 13

O'Dell v. Espinoza, 456 U.S. 430 (1982) 13

People v. Buckles, 167 Colo. 64, 453 P.2d 404 (1968) 9

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 12

Seattle Times v. Rhinehart, 467 U.S. 20 (1984) 11, 14, 15, 16, 17

CONSTITUTIONS

U.S. Const. Amend. I 2

Colo. Const. art. II, §10 11

Colo. Const. art. VI, § 10(2) 3

Colo. Const. art. VI, § 16 4

Colo. Const. art. VI, § 20(1) 3

Colo. Const. art. VI, §25 ..... 3, 4

STATUTES

28 U.S.C. § 1257(a) 1, 12, 13

TABLE OF AUTHORITIES

PAGE

RULES

Colo.App.R. 21 .....1, 2, 11

Colo.App.R. 21(a)(1) 10

Colo.App.R. 21(a)(2) 10

Colo.R.Civ.P. 251.1(b).....9

Colo.R.Civ.P. 251.1(d).....1, 10, 11

Colo.R.Civ.P. 251.10 .....2, 6, 7, 8, 9

Colo.R.Civ.P. 251.10(a).....10, 14

Colo.R.Civ.P. 251.10(b).....10, 14, 15

Colo.R.Civ.P. 251.10(b)(2) 6, 10, 16

Colo.R.Civ.P. 251.16 9

Colo.R.Civ.P. 251.2 9

Colo.R.Civ.P. 251.3 9

Colo.R.Civ.P. 251.31 .....3, 15

Colo.R.Civ.P. 251.31(a).....7, 10

Colo.R.Civ.P. 251.31(c).....10

Colo.R.Civ.P. 251.31(e).....7, 10, 16, 17

Colo.R.Civ.P. 45 .....3, 6, 7, 10, 14

Colo.R.Civ.P. 45(d)(1).....16

APPENDIX A .....1a - 11a

APPENDIX B .....1b - 3b

APPENDIX C 1c- 2c

APPENDIX D .....1d - 12d

Respondents, Judge Claude W. Appel and Judge Robert E. Haeger, respectfully submit the following as their Brief in Opposition to the Petition for Writ of Certiorari:

OPINIONS BELOW

In addition to orders and opinions noted by Petitioner, on March 12, 2002, the Colorado Supreme Court entered an order which granted the petition for Colorado Supreme Court review filed by the Colorado Office of Attorney Regulation Counsel, granted Petitioner's motion to intervene or to file a cross petition seeking identical relief to that requested in his own earlier petition for Colorado Supreme Court review, and issued a Rule to Show Cause why the protective order at issue in this case should not be vacated. The March 12, 2002, order is not reported, but it has been reprinted in Appendix B, *infra*.

JURISDICTION

The United States Supreme Court lacks jurisdiction to decide this case because it is still under active consideration by the Colorado Supreme Court. No "final judgment or decree" within the meaning of 28 U.S.C. § 1257(a) has been entered by the state court.

Petitioner, William C. Danks, invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a). However, on March 12, 2002, the Colorado Supreme Court entered an order (App.B, *infra*, 1b) in the proceedings below granting the Colorado Office of Attorney Regulation Counsel's Petition Pursuant to Colo.App.R. 21 and Colo.R.Civ.P. 251.1(d) and issued a Rule to Show Cause why the protective order which is the subject of this case should not be vacated. The Colorado Supreme Court also permitted Mr. Danks to file a brief in support of the Attorney Regulation

Counsel's petition or to seek identical relief to that sought in Mr. Danks's own earlier petition to the Colorado Supreme Court under Colo.App.R. 21 effectively reversing its previous orders on which Mr. Danks relies for finality. Later, on March 15, 2002, the Colorado Supreme Court also permitted Judge Claude W. Appel and Judge Robert E. Haegen to file a response to its Rule to Show Cause. (App.C, *infra*, 1c.) Mr. Danks filed his brief in the Colorado Supreme Court on or about April 1, 2002, and Judge Appel and Judge Haeger filed their joint response on April 29, 2002. Mr. Danks and the Attorney Regulation Counsel have been permitted until May 13, 2002, to file reply briefs.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

U.S. Const. Amend. I:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Colo.R.Civ.P. 251.10 is reprinted in Appendix D.

Colo.R.Civ.P. 251.31 is reprinted in Appendix D.

Colo.R.Civ.P. 45 is reprinted in Appendix D.

STATEMENT OF THE CASE

This case concerns whether Mr. Danks must be permitted to publish disparaging comments about two Colorado Judges. The disparaging comments come from FBI interviews turned over to Mr. Danks in the midst of an investigation of attorney misconduct allegations against him. The materials given to Mr. Danks are subject to a protective order that prevents his dissemination of the materials or the information they contain. Mr. Danks challenges the protective order as offensive to the First Amendment to the United States Constitution. A proceeding on petitions by Mr. Danks and the Colorado Office of Attorney Regulation Counsel to vacate the protective order is pending concurrently in the Colorado Supreme Court. For that reason, this Court lacks jurisdiction on Mr. Danks' Petition for Writ of Certiorari.

For many years Respondents, Claude W. Appel and Robert E. Haeger, have been, respectively, a District Court Judge in Colorado's Third Judicial District and County Court Judge in Huerfano County, Colorado. Both hold court at the Huerfano County Courthouse in Walsenburg, Colorado. Judge Appel was appointed to the District Court bench in 1986 by then Colorado Governor Richard Lamm. See Colo. Const. art. VI, § 20(1). He stood for voter retention in the elections of 1988, 1994, and 2000. See Colo. Const. art. VI, § 10(2), § 25. By Colorado law, he must again be on the ballot for retention as District Court Judge in 2006. *Id.* Former Governor Roy Romer appointed Judge Haeger to the Huerfano County Court bench in 1987. He stood for voter retention in the elections of 1990, 1994, and 1998, and he must stand for retention again in the fall of 2002. See Colo. Const. art. VI, § 16, § 25.

In 1997 the FBI conducted an investigation of rumors of illegal activity against Judge Appel. Judge Appel was not

interviewed and had no knowledge of the investigation. The investigation included interviews with many people who were asked to comment on Judge Appel's behavior and judicial demeanor. Convicted felons who had been sentenced by Judge Appel or Judge Haeger also were interviewed. Many of those interviewed made disparaging accusations or repeated scandalous rumors against Judge Appel, Judge Haeger, and others. Written summaries of the interviews were placed in an investigative file maintained by the FBI. The scandalous remarks recorded in these interview summaries are at the heart of this matter.

At the conclusion of its investigation the FBI submitted the matter to the United States Attorney for the District of Colorado. In its report to the U.S. Attorney, the FBI stated that the investigation had not developed any evidence of drug sales by Judge Appel or of any instances of official misconduct. The report further stated that information regarding "recreational drug use" by Judge Appel was "unsubstantiated." On December 8, 1997, the United States Attorney declined the case.

As a result, the investigation was terminated, no charges were filed against Judge Appel, and no proceedings resulted from the investigation.

Petitioner, William C. Danks, is an attorney licensed to practice law in Colorado. Mr. Danks has appeared before both Judge Appel and Judge Haeger while representing Dorothy Cruz, Byron Cruz, and/or their business partnership, Cruz Enterprises, in various matters. Judge Appel formerly presided in *Cruz, et al. v. Benine, et al.*, Case No. 96 CV 51 (Huerfano County District Court). Judge Appel ultimately granted summary judgment for the defendants in the case Judge Appel also imposed sanctions against Mr. Danks under Colo.R.Civ.P. 11. Upon information and belief, the matter remains pending on a motion for reconsideration of

both the order granting summary judgment and the imposition of sanctions.

Judge Haeger presided over a jury trial on misdemeanor assault charges against Dorothy Cruz in *People v. Cruz*, Case No. 91 M 039. The trial resulted in a guilty verdict and the imposition of a 3-day jail sentence against Mrs. Cruz in 1992. Mr. Danks did not represent Mrs. Cruz in the trial, and the case had been closed for nearly nine years when Mr. Danks entered his appearance and filed serial motions for post conviction review. Mr. Danks contended that Judge Haeger was biased against his client, and he sought Judge Haeger's recusal, Mr. Danks subsequently commenced an action against Judge Haeger for a writ in the nature of mandamus and for damages. Upon information and belief, the misdemeanor case against Mrs. Cruz case remains pending on the latest of such post-judgment motions.

Because of events surrounding these cases, including the petition to the Presiding Disciplinary Judge for the protective order on which Mr. Danks seeks this Court's review, and the suit against Judge Haeger for a writ of mandamus and for damages, both judges recused themselves from future proceedings in the cases involving the Cruzes and Cruz Enterprises.

In connection with the cases in which he represents the Cruzes and Cruz Enterprises, and in his efforts to overturn judgments and orders against his clients and himself in those cases, Mr. Danks made disparaging statements against Judge Appel, Judge Haeger, and others similar to the rumors that were investigated by the FBI in 1997. Two

separate complaints[1] concerning Mr. Danks were made to the Office of Attorney Regulation Counsel ("ARC"). Based on the complaints, the ARC opened an investigation under Colo.R.Civ.P. 251.10 into Mr. Danks's conduct and whether it violated provisions of the Colorado Rules of Professional Conduct.

As part of its investigation of Mr. Danks, the ARC served a subpoena duces tecum under to the FBI for production of documents related to Judge Appel and Judge Haeger. The subpoena was issued pursuant to authority of the ARC contained in Colo.R.Civ.P. 251.10(b)(2)(App. D. *infra*, 5d), which incorporates Colo.R.Civ.P. 45 (App. D. *infra*, 2d). On October 5, 2001, the FBI turned over its file consisting of approximately 60 pages of raw data and interview summaries. The FBI produced its 1997 investigation of Judge Appel, and it also produced later false and unsubstantiated reports it had received against Judge Haeger and Judge Appel, including one such report made by Mr. Danks.

On October 11, 2001, the ARC turned the FBI documents over to Mr. Danks under the ARC's interpretation of the investigative discovery requirements of Colo.R.Civ.P. 251.10 and Colo.R.Civ.P. 45. No notice was given to Judge Appel or Judge Haeger that the FBI documents had been obtained or that they were being turned over to Mr. Danks. Mr. Danks filed the documents in the Huerfano courts and began distributing copies to Huerfano County residents.

---

[1] Neither of the complaints involved in the ARC's current investigation was made by Judge Appel or Judge Haeger. One complaint (No. 01-01375) was filed by Bernie Fay, a probation officer in Huerfano County also defamed by Mr. Danks's statements. The other investigation (No. 01-00964) was commenced by the ARC itself.

On October 26, 2001, upon learning that the FBI documents had been obtained by ARC and turned over to Mr. Danks, Judge Appel sought a Protective Order from the Presiding Disciplinary Judge of the Colorado Supreme Court under Colo.R.Civ.P. 251.31(e) (App.D, *infra*, 8d to 9d). Judge Haeger joined in the petition. The Presiding Disciplinary Judge entered an interim protective order on October 30, 2001, and set a hearing for November 27, 2001. Following the hearing, on December 18, 2001, the Presiding Disciplinary Judge entered the protective order, *nunc pro tunc* November 27, 2001. (App.A, *infra*, 1a.)

The order declares the FBI documents and information contained therein to be "confidential within the meaning of Colo.R.Civ.P. 251.31(a) and federal law" and that they "remain confidential under Colo.R.Civ.P. 251.10." (App.A, *infra*, 9a.) The protective order prohibits disclosure of the documents and information "by Danks, Attorney Regulation Counsel, or any other party to this proceeding to any other person or entity without further Order of this Court." (App.A, *infra*, 9a.) It provides for its automatic expiration upon admission (without further protective orders) of the FBI documents in any public proceeding before the Presiding Disciplinary Judge or admission into evidence in any other court or public proceeding,

> provided that the FBI Documents so offered were obtained independently from the production of the documents by the FBI pursuant to the Investigative Subpoena issued by Attorney Regulation Counsel.

Id. at 10a. The protective order expressly provides that it does not prevent dissemination of the same information and documents, if obtained independently of the ARC's investigative subpoena. *Id.*

On December 19, 2001, Mr. Danks filed a petition in the Colorado Supreme Court seeking to have the Presiding Disciplinary Judge's protective order vacated. Mr. Danks's petition was denied, as was his motion to reconsider.

However, on December 24, 2001, the ARC filed a petition seeking the same relief. On March 12, 2002, the Colorado Supreme Court issued the order attached hereto as Appendix B granting the ARC's petition. The March 12, 2002, order also reversed the Colorado Supreme Court's earlier position and permitted Mr. Danks to intervene and file a brief in support of the ARC's petition or a cross petition for the relief originally sought in Mr. Danks's December 19, 2001, petition. (App.B, *infra*, 2b.) Mr. Danks filed a brief on or about April 1, 2002, which goes beyond the ARC's petition and seeks identical relief to that requested in his December 19, 2001, petition.

The matter remains pending before the Colorado Supreme Court, and reply briefs of the ARC and Mr. Danks are due on May 13, 2002. No final judgment or decree has been entered by the Colorado Supreme Court.

REASONS FOR DENYING THE WRIT

I. THE COLORADO SUPREME COURT IS STILL CONSIDERING QUESTIONS ON WHICH PETITIONER SEEKS REVIEW ON CERTIORARI IN THIS COURT.

In Colorado, the State Supreme Court has original and exclusive jurisdiction in matters of attorney discipline. Colo.R.Civ.P. 251.1(b); *People v. Buckles*, 167 Colo. 64, 67, 453 P.2d 404, 405 (1968). Certain disciplinary functions, including investigations of complaints and imposition of discipline have been delegated by the court to the Attorney

Regulation Committee of the Supreme Court, Colo.R.Civ.P. 251.2, the Attorney Regulation Counsel, Colo.R.Civ.P. 251.3, and to the Presiding Disciplinary Judge of the Supreme Court, Colo.R.Civ.P. 251.16.

Proceedings on attorney misconduct complaints against Mr. Danks are in the investigative stage under Colo.R.Civ.P. 251.10. In the investigative stage the attorney in question is notified of the investigation and the nature of allegations against him, Colo.R.Civ.P. 251.10(a), and he is required to file a response to the allegations within twenty days after such notice. *Id.* The investigation is conducted under Colo.R.Civ.P. 251.10(b) pursuant to subpoena powers granted to the ARC by Colo.R.Civ.P. 251.10(b)(2). The subpoena authority of the ARC expressly incorporates Colo.R.Civ.P. 45, which governs the issuance of subpoenas in civil actions and requires that subpoenas for production of documents from third parties be issued in connection with third party depositions. The Presiding Disciplinary Judge is given authority to supervise and enforce the ARC's exercise of its subpoena power by protective orders and recommendations of contempt of the Supreme Court. Colo.R.Civ.P. 251.10(b)(2); Colo.R.Civ.P. 251.31(a), (c), and (e).

There are two avenues of review of an interlocutory order entered by the Presiding Disciplinary Judge such as the protective order entered in this case. Under Colo.App.R. 21 the Colorado Supreme Court exercises original jurisdiction to supervise all Colorado courts, Colo.App.R. 21(a)(1), and to issue extraordinary writs, including writs in the nature of mandamus and prohibition. Colo.App.R. 21(a)(2). In addition, under Colo.R.Civ.P. 251.1(d), the Colorado Supreme Court retains plenary jurisdiction and

> authority to review any determination made in the course of a disciplinary

> proceeding and to enter any order with respect thereto, including an order directing that further proceedings be conducted as provided by these Rules.

Colo.R.Civ.P. 251.1(d).

The petition filed by the ARC on December 24, 2001, which is currently pending before the Colorado Supreme Court, invokes the Colorado Supreme Court's jurisdiction under both Colo.App.R. 21 and Colo. R.Civ.P. 251.1(d). All of the parties before this Court, and also the ARC and the Presiding Disciplinary Judge, are currently before the Colorado Supreme Court arguing their positions for and against vacating the protective order.

Mr. Danks filed a brief in the Colorado Supreme Court on April 1, 2002, which raises the same questions that he raises in his Petition for Writ of Certiorari. Before the Colorado Supreme Court, Mr. Danks argues that the protective order constitutes an unconstitutional prior restraint on free speech, that it represents an improper expansion of the rule in *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), and that the protective order constitutes an impermissible recall of information "from the public domain," just as he does in his Petition for Writ of Certiorari in this Court. In his brief pending before the Colorado Supreme Court, Mr. Danks also goes beyond the scope of issues raised here by arguing that the protective order is also repugnant to free speech rights guaranteed by the Colorado Constitution, which he contends contains a broader guarantee than that of the First Amendment to the United States Constitution. See Colo. Const. art. II, §10.

The Colorado Supreme Court has not entered any final judgment or decree with respect to the protective order. It may vacate the protective order, as Mr. Danks has asked it

to do, which would obviate this Court's review on Mr. Danks's Petition for Writ of Certiorari. In such event, the parties may come before this Court in reversed roles, Judge Appel and Judge Haeger as petitioners and Mr. Danks, together with the ARC, appearing as respondents. Issues that might be raised in this Court in such event cannot be definitely predicted.

The jurisdiction of this Court to review state court litigation on certiorari is generally limited to review of "final judgments or decrees." 28 U.S.C. § 1257(a). This Court has observed, however, that the final-judgment rule for jurisdiction to review state court determinations of federal issues is not administered in a "mechanical fashion." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). Departure from a requirement that would "preclude review 'where any thing further remains to be determined by a State court'" has been justified in at least four categories of cases. *Id.*, quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). However, two basic characteristics that are not present in this case are common to cases of all categories in which a departure from the finality requirement has been made. There must be a final determination of the federal issue on which this Court is asked to exercise its authority to review, *Cox Broadcasting* at 477, and immediate review in this Court must "avoid 'the mischief of economic waste and of delayed justice.'" *Id.* at 478, quoting *Radio Station WOW* at 124. "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 81 (1997), quoting *Market Street Railway Co. v. Railroad Comm'n of California*, 324 U.S. 548, 551 (1945) (emphasis added).

The March 12, 2002, order of the Colorado Supreme Court reconsidered and effectively reversed its order of January 9, 2002, on which Mr. Danks relies for this Court's jurisdiction under the finality requirement of 28 U.S.C. § 1257(a). There has been no final determination of the federal issue in this case. *Cox Broadcasting* at 477. Rather than avoid the mischief of economic waste and delayed justice, *Id.* at 478, review at this stage may promote waste by deciding issues that may become moot or inconsequential to the dispute as it may be framed in the future. There has been "no final word of a final court" in this case, and for that reason, this Court should deny the Petition for Writ of Certiorari for lack of jurisdiction under 28 U.S.C. § 1257(a). *Jefferson* at 81-28; see *O'Dell v. Espinoza*, 456 U.S. 430 (1982) (*per curiam*) (without "effective determination of litigation, finality requirement of 28 U.S.C. § 1257(a) has not been met).

II. THE PROTECTIVE ORDER IS SQUARELY WITHIN THE LIMITATION ON FIRST AMENDMENT RIGHTS RECOGNIZED BY *SEATTLE TIMES v. RHINEHART*

There is no compelling reason for United States Supreme Court review in this case because the protective order does not conflict with this Court's decision in *Seattle Times v. Rhinehart,* 467 U.S. 20 (1984). Rather, the protective order is squarely within the limitation on First Amendment rights recognized in that case.

Mr. Danks's Petition for Writ of Certiorari is not accurate in its depiction of Mr. Danks as a stranger to the proceedings in which the FBI documents were subpoenaed and produced to Mr. Danks. Pursuant to procedures in place

in cases of attorney discipline, Mr. Danks was informed of allegations against him, and he filed a response to those allegations with the Attorney Regulation Counsel. Colo.R.Civ.P. 251.10(a).[2] The ARC then commenced its investigation, and, pursuant to its interpretation of the requirements of Colo.R.Civ.P. 251.10(b) and Colo.R.Civ.P. 45, it notified Mr. Danks of a deposition of the FBI custodian of documents and its subpoena duces tecum for production of documents related to Judge Appel and Judge Haeger. Mr. Danks appeared for the deposition, although it had been postponed at the FBI's request. He later received copies of the FBI documents pursuant to an agreement among the ARC, the FBI, and Mr. Danks for production of the documents without an actual deposition appearance. The documents were received by Mr. Danks through a discovery process subject to Colo.R.Civ.P. 251.10(b) and Colo.R.Civ.P. 251.31, and he is incorrect to suggest that he received the documents outside of that process.

In *Seattle Times,* this Court ruled definitively on the degree of First Amendment scrutiny required of protective orders issued under the "good cause" standard of Rule 26(c) of the rules of civil procedure. This Court held that "where ... a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict dissemination of the information if gained from other sources, it does not offend the First Amendment." *Id.* at 37. *Seattle Times* specifically

---

[2] In the protective order, the Presiding Disciplinary Judge found that, at the investigative stage, Mr. Danks was not a party to any proceeding. (App.A., *infra*, 4a.) Nevertheless, Mr. Danks has at least some limited rights of participation at the investigative stage under Colo.R.Civ.P. 251.10, which have been acknowledged by the Presiding Disciplinary Judge in his response to the Rule to Show Cause issued by the Colorado Supreme Court in the matter still pending below.

held that a protective order prohibiting dissemination of discovered information prior to trial is not "the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Id.* 467 U.S. at 33. The Protective Order entered by the Presiding Disciplinary Judge in this case conforms in its purpose, its scope, and its express limitations to that upheld in *Seattle Times*.

As explained in *Seattle Times,* a protective order occupies a unique position in relation to the First Amendment. *Id.* at 34. Information obtained during; pretrial discovery is a matter of "legislative grace," not a constitutional right. But for the broad rules adopted by the legislatures (or the courts) authorizing the discovery process, certain information would never have been made available. "A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. Thus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations." *Id.* at 32.

The analysis employed in *Seattle Times* to determine the constitutionality of Rule 26(c) protective orders is equally applicable to protective orders issued for good cause pursuant to Colo.R.Civ.P. 251.31(e) and Colo.R.Civ.P. 45(d)(1) in connection with disciplinary proceedings. As with discovery in general civil litigation, information produced in connection with investigations undertaken by the ARC is a matter of "legislative grace," not a constitutional right.

In this case the FBI Documents were produced and provided to Mr. Danks, not because they were public information, but because the ARC issued a subpoena pursuant to Colo.R.Civ.P. 251.10(b)(2) and interpreted the incorporation of Rule 45 within its subpoena authority as

requiring production of the documents to Mr. Danks. It cannot be seriously controverted that, absent the ARC's subpoena, Danks would never have obtained the FBI Documents in the first place. Controlling Danks' ability to now use documents that he had no way to obtain other than through discovery procedures invoked in this proceeding does not "raise the same specter of government censorship" as it might if he had obtained those same documents through means independent of the judicial process. *Seattle Times,* 467 U.S. at 32, 34.

Moreover, protective orders under Colo.R.Civ.P. 251.31(e) satisfy the two part test for constitutionality set out by the Supreme Court in *Seattle Times.* First, in a disciplinary proceeding, the government has the same substantial interest, unrelated to the suppression of expression, in making sure that information coerced from parties and others under the auspices of the court and the discovery rules is not abused. Second, the standard for issuing a protective order under Colo.R.Civ.P. 251.31(e) is the same as under Rule 26(c)-- a showing of good cause. As with a Rule 26(c) protective order, a determination by the presiding authority familiar with facts of the case that the order has been issued for good cause is sufficient to safeguard whatever rights the public possesses in the discovered materials.

Because the protective order issued by the Presiding Disciplinary Judge falls squarely within the limitation on First Amendment rights recognized by *Seattle Times*, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For the reasons and upon the authorities set forth above, Respondents, Judge Claude W. Appel and Judge

Robert E. Haeger, request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

Ken Salazar
Attorney General
Alan J. Gilbert*
Solicitor General
Friedrick C. Haines
Assistant Attorney General
1525 Sherman Street, Fifth Floor
Denver, Colorado 80203
Telephone: (303) 866-5240
**Counsel of Record*

Attorneys for Respondents

APPENDIX A

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 600 17th STREET, SUITE 510-S DENVER, COLORADO 80202	▲ **COURT USE ONLY** ▲ Case Number: **01PDJ098**
In the Matter of the Requests for Investigation of William Charles Danks, filed by Bernie Fay (01-01375) and Attorney Regulation Counsel (01-00964)	
PROTECTIVE ORDER	

This matter is before the Court on the "Petition for Protective Order Pursuant to C.R.C.P. 251.31(e)" filed by Claude W. Appel on October 26, 2001. Filed under seal with the Petition was a copy of an investigative file produced by the Federal Bureau of Investigation ("FBI") pursuant to a subpoena issued by Attorney Regulation Counsel under C. R. C. P. 251.1.0 (the "FBI Documents"). On October 26, 2001, Petitioner Robert E. Haeger filed a "Joinder in Petition for Protective Order Pursuant to C.R.C.P. 251.31(e)." (The Petition filed by Claude W.

Appel and the Joinder in the Petition filed by Robert E. Haeger are collectively referred to as the "Petition"). On October 29, 2001, in response to the Petition, William C. Danks ("Danks") filed a "Petition for Issuance of Subpoenas and Brief of William C. Danks." Also on October 29, 2001, the Office of Attorney Regulation Counsel filed a response; to the Petition.

The Court held a status conference on the Petition and the Responses on October 30, 2001 and directed the parties to file simultaneous briefs in support of their positions. On October 30, 2001, the Court entered a written "Order Re: Interim Protective Order Pursuant to C.R.C.P. 251.10" ("Interim Order"). Briefs were filed by the parties on November 20, 2001. On November 21, 2001, Petitioners and Danks filed Reply Briefs.

A hearing was held on the Petition and the Responses on November 27, 2001. Petitioner Appel was represented by Michael H. Berger. Petitioner Haeger was represented by Jeffrey A. Chase. William C. Danks was present at the hearing and was represented by Alfred T. McDonnell. The Office of Attorney Regulation Counsel was represented at the hearing by Charles E. Mortimer, Jr., Assistant Attorney Regulation Counsel. Deputy Attorney Regulation Counsel Nancy L. Cohen was present during a portion of the hearing.

Upon consideration of the Petition, the FBI Documents, the Responses, the Briefs submitted by the Parties and arguments of counsel, the Court finds and concludes as follows:

1. The Court has jurisdiction over the parties to the Petition and the Responses and the subject matter of this proceeding pursuant to C.R.C.P. 251.31(e). That Rule provides:

> To protect the interests of a complainant, witness, third party, or respondent, the Presiding Disciplinary Judge or a Hearing Board, may, upon application of any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application.

2. The Subpoena issued by the Office of Attorney Regulation Counsel to the FBI ("Investigative Subpoena") was an investigative subpoena, issued pursuant to C.R.C.P. 251.10. While that rule makes reference to C.R.C.P. 45, C. R. C. P. 251.10 is the controlling rule with respect to the rights and obligations of Attorney Regulation Counsel with respect to the documents produced pursuant to the Investigative Subpoena.

3. The FBI Documents were produced by the FBI pursuant to the Investigative Subpoena.

4. Danks was not a party to any proceeding with respect to the issuance of the Investigative Subpoena and C.R.C.P. 251.10 did not authorize or require Attorney Regulation Counsel to provide to Danks any confidential documents obtained pursuant to the Investigative Subpoena.

5. The FBI Documents, when obtained by Attorney Regulation Counsel from the FBI, were "confidential" within the meaning of C.R.C.P. 251.31 (a) and therefore, Attorney Regulation Counsel had no authority or authorization to provide the documents to Danks or anyone else. The Court rejects the position asserted by Attorney Regulation Counsel that it had the unfettered discretion to determine when something is confidential and when it is not. Such a position is contrary to the provisions of C.R.C.P. 251.31(a), (b), (c) and (d). The investigations of Danks are confidential proceedings pursuant to 251.31 (a) unless and until a formal complaint is filed against and served upon Danks pursuant to C.R.C.P. 251.14.

6. Danks received the documents as the result of an investigative subpoena issued by Attorney Regulation Counsel to the FBI, the production of the documents pursuant to that subpoena, and the subsequent transmittal of a complete copy set of the documents to Danks by Attorney Regulation Counsel under either an

transmittal of a complete copy set of the documents to Danks by Attorney Regulation Counsel under either an agreement to do so between Attorney Regulation Counsel and Danks or under a misapprehension by Attorney Regulation Counsel that it was required and/or authorized to do so.

7. The FBI Documents were obtained by Danks solely through the discovery processes authorized by C.R.C.P. 251. There is no evidence or claim by Danks that Danks obtained the FBI Documents other than through the Investigative Subpoena issued by Attorney Regulation Counsel. Danks has never requested or obtained the FBI Documents under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (West 2001), the Federal Privacy Act, 5 U.S.C. § 552a (West 2001), or under any other federal or state law.

8. In addition to (and independent from) the confidentiality that attaches to the FBI Documents under C.R.C.P. 251.31(a), the FBI Documents are confidential within the meaning of C. R. C. P. 251.31 (e) by virtue of federal law. The Court takes judicial notice that a person cannot simply walk into an FBI office and ask to see any or all of the FBI's investigative files and records. Such records are not public records or generally available to the public. Those document's are treated as confidential by the FBI.

9. There was no waiver of the federal confidentiality of the FBI Documents when the FBI Documents were produced to Attorney Regulation Counsel. First, because there has been no formal request

under either the Privacy Act or FOIA, there is no evidence that any federal agency has been afforded any opportunity to review the questioned documents for confidentiality or privilege. Second, the right of confidentiality that arises under FOIA and the Privacy Act were federal statutory rights of the Petitioners as well as the numerous other persons named in the FBI Documents. As a result, the FBI could not and did not cause a waiver of Petitioners' rights to privacy and confidentiality with respect to the FBI Documents.

10. The Court further concludes that a state officer (Attorney Regulation Counsel) cannot waive confidentiality protections granted to citizens by federal law. Therefore, the fact that Attorney Regulation Counsel provided the FBI Documents to Danks does not constitute a waiver of the right of confidentiality belonging to the Petitioners and other persons named in the FBI Documents.

11. The Court does not believe it is required, as part of this proceeding, to make a finding under section 552 (b) (7) (C) of the Freedom of Information Act with respect to whether the disclosure of the FBI Documents "could reasonably be expected to constitute an unwarranted invasion of personal privacy" with respect to the Petitioners and the other persons named in the FBI Documents. However, if such a finding were required as a predicate to the issuance of a protective order in this case, the Court would find that there is a reasonable probability that the disclosure of the FBI Documents "could reasonably be expected to constitute an unwarranted invasion of the personal privacy" rights of Petitioners and

the other persons named in the FBI Documents. The Court specifically notes that the FBI and the United States Attorney for the District of Colorado reviewed the FBI Documents and determined that there was no evidence of any wrongdoing. Courts invariably hold under section 552(b)(7)(C) of FOIA that where there is a finding of no misconduct, that investigative materials relating to the investigation will not be disclosed because that will cause unwarranted invasion of personal privacy rights of the subjects of or persons named in the investigative materials. *Stern v. Federal Bureau of Investigation,* 737 F.2d 84, 89 (D.C. Cir. 1984); *Hunt v. Federal Bureau of Investigation,* 972 F.2d 286, 287 (9th Cir. 1992); *Sherman v. United States Department of the Army,* 244 F.3d 357 (5th Cir. 2001) and *Mueller v. United States Department of the Air Force,* 63 F.Supp.2d 738 (E.D. Va. 1999).

12. The Court rejects Danks' argument that because Danks has already disseminated the FBI Documents to a variety of third persons prior to the issuance of the Interim Protective Order that such actions preclude the issuance of a Protective Order or prospective relief. The Court finds that further dissemination of the FBI Documents by Danks would be wrongful and would cause further harm to the Petitioners and the other persons named in the FBI Documents. Although the Court has no power in the context of this Petition for Protective Order to remedy any harm already caused by Danks' dissemination of the FBI Documents, C.R.C.P. 251.31(e) specifically grants power to the Court to prevent further harm as a result of further dissemination. *See Rugiero v. United States*

Department of Justice, 257 P.3d 534 (6th Cir. 2001).

13. Good cause has been shown for the issuance of a Protective Order pursuant to C.R.C.P. 251.31(e). The continued dissemination by Danks of documents which were provided to him by Attorney Regulation Counsel and which are confidential under both state and federal law, poses a significant and substantial risk of harm to the Petitioners, the other persons named in the FBI Documents, the judicial system and the system of justice as a whole. There is no justifiable reason that the investigation of alleged misconduct by a single lawyer - Danks - should subject the multitude of persons named (as many as 100 persons) in the FBI Documents to public humiliation and ridicule, particularly when the agencies authorized by law to investigate and prosecute violations of federal law have determined that no such violations had occurred. Therefore, good cause exists for the entry of a protective order.

14. A protective order is necessary to protect the interests of Petitioners Appel and Haeger and is also necessary to protect the interests of the judicial system, and all the people whose identities are disclosed in the FBI Documents.

15. The Court rejects Danks' argument that the First Amendment to the United States Constitution and Article II, Section 10 of the Colorado Constitution prohibit the issuance of a protective order in this case. The United States Supreme Court case of *Seattle Times Co. v.*

Rhinehart, 467 U.S. 20 (1984), and the Colorado Supreme Court case of *Bowlen v. District Court*, 733 P.2d 1179 (Colo. 1987), are controlling on this issue. In *Seattle Times Co.*, the United States Supreme Court held that "where ... a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict dissemination of the information if gained from other sources, it does not offend the First Amendment." 467 U.S. at 20. The FBI Documents were obtained by Danks solely through the discovery processes authorized by C.R.C.P. 251. The Court has a substantial and compelling interest in controlling the discovery process and preventing "abuse of its process," 467 U.S. at 35. This Court's determination of whether good cause exists for the issuance of a Protective Order provides whatever protections the First Amendment requires and the issuance of this Protective Order does not constitute an unconstitutional prior restraint.

Upon the foregoing, IT IS ORDERED:

1. The FBI Documents and the information contained therein are confidential within the meaning of C. R. C. P. 251.31 (a) and federal law and shall not be further disclosed by Danks, Attorney Regulation Counsel or any other party to this proceeding to any other person or entity without further Order of this Court. The documents in question remain confidential under C.R.C.P. 251.10.

2. This Protective Order expires automatically upon the occurrence of any of the following events:

a. The admission into evidence of the FBI Documents in a public proceeding before this Court, unless this Court enters a further protective order.

b. The admission into evidence of the FBI Documents in any other court or public proceeding provided that the FBI Documents so offered were obtained independently from the production of the documents by the FBI pursuant to the Investigative Subpoena issued by Attorney Regulation Counsel.

3. This Protective Order does not prevent any person acquiring the same information which is contained within the questioned documents from another, independent source from disclosing such independently obtained information.[1]

4. This Protective Order replaces the Order Re: Interim Protective Order Pursuant to C.R.C.P. 251.10 issued October 30, 2001.

---

[1] It has been represented to the PDJ that Danks has filed copies of all or portions of the questioned documents in various courts. Information which is derived from the questioned documents, whether the original set provided to Danks or copies thereof even though previously filed with other courts, falls within the proscriptions of this protective order.

DATED THIS 18th DAY OF DECEMBER, 2001,
rtunc pro tune, November 27, 2001.

BY THE COURT

_____
Roger,. Keithley,
Presiding Disciplinary Judge

Copies to:

Charles E. Mortimer, Jr. — Via Hand Delivery
Office of Attorney Regulation Counsel

Alfred T. McDonnell — Via First Class Mail
Respondent's Counsel

Michael H. Berger — Via First Class Mail
Petitioner's Counsel

Jeffrey A. Chase — Via First Class Mail
Petitioner's Counsel

APPENDIX B

SUPREME COURT, STATE OF COLORADO TWO EAST 14th AVENUE DENVER, COLORADO 80203 ORIGINAL PROCEEDING IN DISCIPLINE Petition Pursuant to C.A.R. 21	CASE NO. 01SA404
IN RE: In the Matter of the Requests for Investigation of William Charles Danks, filed by Bernie Fay (01-01375) and Attorney Regulation Counsel (01-00964)	
ORDER OF THE COURT	

Upon consideration of the Petition Pursuant to C.A.R. 21 and C.R.C.P. 251.1(d) filed herein by Attorney Regulation Counsel ("ARC"), and the Petition for Reconsideration and the Motion for Leave to Intervene in Support of the ARC's Petition Pursuant to C.A.R. 21 and C.R.C.P. 251.1(d) or, in the alternative, to file a Cross-Petition seeking Identical Relief filed by William Danks, and now being sufficiently advised in the premises,

IT IS ORDERED that upon reconsideration, Danks' Motion for Leave to Intervene is GRANTED.

IT IS FURTHER ORDERED that ARC's Petition Pursuant to C.A.R. 21 and C.R.C.P. 251.1(d) is GRANTED. Therefore,

IT IS ORDERED that:

(1) Mr. Danks may file a Brief in support of ARC's petition, or a cross-petition seeking identical relief on the grounds previously asserted in Mr. Danks' initial petition, on or before (20 days from the date of this order);

(2) that the Presiding Disciplinary Judge shall file an Answer to this Rule to Show Cause why the relief requested in ARC's petition and Mr. Dank's pleading should not be granted, on or before (40 days from the date of this order); and

(3) the ARC and Mr. Danks may file a Reply to the Presiding Disciplinary Judge's Answer on or before (55 days from the date of this order)

IT IS FURTHER ORDERED that pursuant to C.A.R. 21(g) (2) all proceedings below

are stayed.

BY THE COURT, EN BANC,
MARCH 12, 2002.

cc:

Alfred T. McDonnell
Andrew S. Kelly
ARNOLD & PORTER
370 Seventeenth St., #4500
Denver, CO 80202

Jeffery A. Chase
Jacobs Chase Frick
1050 Seventeenth St., #1500
Denver, CO 80265

Michael H. Berger
Koff, Corn & Berger, PC
303 E. Seventeenth Ave., #940
Denver, CO 80203-1262

Hon. Roger Keithley
Presiding Disciplinary Judge

Charles E. Mortimer, Jr.
Assistant Regulation Counsel

APPENDIX C

SUPREME COURT, STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203 ORIGINAL PROCEEDING IN DISCIPLINE Petition Pursuant to C.A.R. 21	CASE NO. 01SA404
IN RE: In the Matter of the Requests for Investigation of William Charles Danks, filed by Bernie Fay (01-1375) and Attorney Regulation Counsel (01-00964)	
ORDER OF THE COURT	

Upon consideration of Motions for Clarification of Order of Court and Motions for Permission to Respond, filed by Claude Appel and Robert Haeger, and being sufficiently advised in the premises,

IT IS ORDERED that the order entered by the Presiding Disciplinary Judge on December 18, 2001 remains in effect, but that the underlying disciplinary proceedings against Mr. Danks are stayed pending further orders of this court.

IT IS FURTHER ORDERED that Judges Appel

and Haeger may file Answers to the Rule to Show Cause.

BY THE COURT, MARCH 15, 2002

cc

Alfred T. McDonnell
Andrew S. Kelley
Arnold & Porter
370 Seventeenth St., #4500
Denver, CO 80202

Michael H. Berger
Koff, Corn & Berger, PC
303 E. Seventeenth Ave., #940
Denver, CO 80203-1262

Jeffrey A. Chase
Jacobs Chase Frick
1050 Seventeenth St., #1500
Denver, CO 80265

Hon. Roger Keithley
Presiding Disciplinary Judge
Charles E. Motimer, Jr.
Assistant Regulation Counsel

APPENDIX D

RULE 45. SUBPOENA

(a) For Attendance of Witnesses; Form; Issue. Subpoenas may be issued under Rule 45 only to compel attendance of witnesses, with or without documentary evidence, at a deposition, hearing or trial. Every subpoena shall state the name of the court, and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified.

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may: (1) Quash or modify the subpoena if it is unreasonable and oppressive; or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) Service. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to such person the fees for one day's attendance and the mileage allowed by law. Service is also valid if the person named in the subpoena has signed a written admission or waiver of personal service. When the subpoena is issued on behalf of the

state of Colorado, or an officer or agency thereof, fees and mileage need not be tendered. Proof of service shall be made as in Rule 4(h). Unless otherwise ordered by the court for good cause shown, such subpoena shall be served no later than forty-eight hours before the time for appearance set out in said subpoena. The party issuing or causing the issuance of the subpoena pursuant to this rule, except in post-judgment proceedings, shall serve a copy of the subpoena (including a complete list of documents and things requested to be provided pursuant to the subpoena) upon all parties of record, including pro se parties, in the manner prescribed by C.R.C.P. 5(b). Service on the other parties shall be made promptly after the service of the subpoena upon the person named therein. Original subpoenas and returns of service of such subpoenas need not be filed with the court.

(d) Subpoena for Taking Depositions; Place of Examination.

(1) A deposition subpoena, upon notice to all parties to the action, may require the production of documentary evidence which is within the scope of discovery permitted by Rule 26. Any party, the person to whom a deposition subpoena is directed, or any other person claiming an interest in the documents affected, may move for a protective order under Rule 26, in addition to any other remedy available under Rule 45. The person to whom the subpoena is directed may, within ten days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than ten days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any

or all of the designated materials. If objection is made, the party serving the subpoena is not entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of this state may be required by subpoena to attend an examination upon deposition only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state may be required by subpoena to attend only within forty miles from the place of service or in the county wherein he resides or is employed or transacts his business in person or at such other convenient place as is fixed by an order of court.

(e) Subpoena for Deposition, Hearing or Trial. Subpoenas for attendance at a deposition, hearing or trial shall be issued either by the clerk of the court in which the case is docketed, or by one of counsel whose appearance has been entered in the particular case in which the subpoena is sought. A subpoena requiring the attendance of a witness at a deposition, hearing or trial may be served any place within the state.

(f) Subpoena in Aid of Execution or Proceedings Subsequent to Judgment. Every subpoena or subpoena to produce issued in accordance with post-judgment proceedings of C.R.C.P. 69 shall comply with the provisions for service, attendance, production of

documentary evidence, and depositions required by this Rule 45. Written interrogatories pursuant to C.R.C.P. 69 shall be personally served on the judgment debtor in accordance with the requirements of, and in the manner provided for service of a subpoena under this Rule 45.

RULE 251.10. INVESTIGATION OF ALLEGATIONS

(a) When Commenced. If, pursuant to C.R.C.P. 251.9, the Regulation Counsel makes a determination to proceed with an investigation, the Regulation Counsel shall give the attorney in question written notice that the attorney is under investigation and of the general nature of the allegations made against the attorney. The attorney in question shall file with the Regulation Counsel a written response to the allegations made against the attorney within twenty days after notice of the investigation is given.

Upon receipt of the attorney's response, or at the expiration of the twenty-day period if no response is received, the matter shall be assigned to an Investigator for investigation and report.

(b) Procedures for Investigation.

(1) The Investigator. A member of the committee, the Regulation Counsel, a member of the Regulation Counsel's staff, or an attorney enlisted pursuant to C.R.C.P. 251.2(b)(1) may act as Investigator. The Investigator shall expeditiously conduct an investigation of the allegations made against the attorney in question.

(2) Procurement of Evidence During Investigation. In the course of an investigation conducted pursuant to these Rules, the Investigator, acting pursuant to and in conformity with these Rules, shall have the power to administer oaths and affirmations.

In connection with an investigation of allegations made against an attorney, the Chair of the committee or the Regulation Counsel may issue subpoenas to compel the attendance of witnesses, including the attorney in question, and the production of pertinent books, papers, documents, or other evidence in proceedings before the Investigator. All such subpoenas shall be subject to the provisions of C.R.C.P. 45. Any challenge to the power to subpoena as exercised pursuant to this Rule shall be directed to the Presiding Disciplinary Judge.

Any person who fails or refuses to comply with a subpoena issued pursuant to this Rule may be cited for contempt of the Supreme Court.

Any person who intentionally obstructs the Regulation Counsel or the committee or any part thereof in the performance of their duties may be cited for contempt of the Supreme Court.

Any person having been duly sworn to testify who refuses to answer any proper question may be cited for contempt of the Supreme Court.

A contempt citation may be issued by the Supreme Court upon recommendation of the Presiding Disciplinary Judge. A copy of the recommendation, together with the

findings of fact made by the Presiding Disciplinary Judge surrounding the contemptuous conduct, shall be filed with the Supreme Court. The Supreme Court shall then determine whether to impose contempt.

(3) Investigator's Report. When the Investigator is not a member of the Regulation Counsel's staff, the Investigator shall submit a written report of investigation and recommendation to the committee for a determination as provided in C.R.C.P. 251.12. If the Investigator is a member of the Regulation Counsel's staff, the matter shall be submitted as provided in C.R.C.P. 252.11.

(4) Conditional Admission. While the matter is under investigation, the attorney in question and the Regulation Counsel may tender an agreed upon conditional admission of misconduct as provided in C.R.C.P. 251.22 to the committee when the form of discipline is no greater than a private admonition. When the form of discipline is greater than a private admonition or, if a range of disciplinary measures is specified in the conditional admission, then the conditional admission shall be tendered to the Presiding Disciplinary Judge. When a conditional admission is tendered pursuant to this Rule, the person acting as Investigator may forego submitting a written report of investigation and recommendation to the committee as provided in subsection (3) of this Rule.

RULE 251.31. ACCESS TO INFORMATION CONCERNING PROCEEDINGS UNDER THESE RULES

(a) Availability of Information. Except as otherwise provided by these rules, all records, except the work product, deliberations and internal communications of the Regulation Counsel, the committee, the Presiding Disciplinary Judge, the Hearing Boards, and the Supreme Court shall be available to the public after the committee determines that reasonable cause to believe grounds for discipline exists and the Regulation Counsel files and serves a complaint as provided in C.R.C.P. 251.14, unless the complainant or the respondent obtains a protective order.

Unless otherwise ordered by the Supreme Court or the Presiding Disciplinary Judge, nothing in these rules shall prohibit the complaining witness, the attorney, or any other witness from disclosing the existence of proceedings under these rules or from disclosing any documents or correspondence served on or provided to those persons.

(b) Confidentiality. Before the filing and service of a complaint as provided in C.R.C.P. 251.14, the proceedings are confidential within the Office of the Regulation Counsel, the committee, the Presiding Disciplinary Judge, and the Supreme Court, except that the pendency, subject matter, and status of an investigation may be disclosed by the Regulation Counsel if:

(1) The respondent has waived confidentiality;

(2) The proceeding is based upon allegations that include either the conviction of a crime or discipline imposed by a foreign jurisdiction;

(3) The proceeding is based on allegations that have become generally known to the public; or,

(4) There is a need to notify another person or organization, including the fund for client protection, to protect the public, the administration of justice, or the legal profession.

(c) Public Proceedings. When the committee determines that reasonable cause to believe that grounds for discipline exists and the Regulation Counsel files and serves a complaint as provided in C.R.C.P. 251.14, or when a petition for reinstatement or readmission is filed, the proceeding is public except for:

(1) The deliberations of the Presiding Disciplinary Judge, the Hearing Board, or the Supreme Court; and,

(2) Information with respect to which a protective order has been issued.

(d) Proceedings Alleging Disability. In disability proceedings, all orders transferring an attorney to or from disability inactive status shall be matters of public record, but otherwise, disability proceedings shall be confidential and shall not be made public, except by order of the Supreme Court, the Presiding Disciplinary Judge, or a Hearing Board.

(e) Protective Orders. To protect the interests of a complainant, witness, third party, or respondent, the Presiding Disciplinary Judge or a Hearing Board, may, upon application of any person and for good cause shown,

issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application.

(f) Disclosure to Law Firms. When the Regulation Counsel obtains an order transferring the attorney to disability inactive status or immediately suspending the attorney, or is authorized to file a complaint as provided by C.R.C.P. 251.12, the attorney shall make written disclosure to the attorney's current firm and, if different, to the attorney's law firm at the time of the act or omission giving rise to the matter, of the fact that the order has been obtained or that a disciplinary proceeding as provided for in these rules has been commenced. The disclosures shall be made within fifteen days of the date of the order or of the date the Regulation Counsel notified the attorney that a disciplinary proceeding has been commenced.

(g) Pending Investigations. Except as provided by section (b) of this rule or when the attorney waives confidentiality, the Regulation Counsel shall treat as confidential proceedings pending with the Regulation Counsel or before the committee.

(h) Cases Dismissed. Except as provided by section (b) of this rule or when the attorney waives confidentiality, the Regulation Counsel shall treat as confidential proceedings that have been dismissed.

(i) Private Admonitions. Any public proceeding in which a private admonition is imposed as provided by C.R.C.P. 251.6 shall be public, as follows: the fact that private admonition is imposed shall be public information, but the private admonition itself shall not be disclosed.

(j) Production of Records Pursuant to Subpoena. The Regulation Counsel, pursuant to a valid subpoena, shall not permit access to files or records or furnish documents that are confidential as provided by these rules unless the Supreme Court orders otherwise. When counsel is permitted to disclose confidential documents contained in files or confidential records, a reasonable fee may be charged for identification of and photocopying the documents and records.

(k) Response to False or Misleading Statement. If public statements that are false or misleading are made about any disciplinary or disability case, the Regulation Counsel may disclose any information necessary to correct the false or misleading statements.

(l) Request for Nonpublic Information. A request for nonpublic information other than that authorized for disclosure under subsection (b) of this Rule shall be denied unless the request is from:

(1) An agency authorized to investigate the qualifications of persons for admission to practice law;

(2) An agency authorized to investigate the qualifications of persons for government employment;

(3) An attorney discipline enforcement agency;

(4) A criminal justice agency; or,

(5) An agency authorized to investigate the qualifications of judicial candidates. If a judicial nominating commission of the State of Colorado requests the information it shall be furnished promptly and the Regulation Counsel shall give written notice to the attorney that specified confidential information has been so disclosed.

(m) Notice to the Attorney. Except as provided in subsection (l)(5) of this Rule, if the Regulation Counsel is permitted to provide nonpublic information requested, and if the attorney has not signed a waiver permitting the requesting agency to obtain nonpublic information, the attorney shall be notified in writing at his or her last known address of that information which has been requested and by whom, together with a copy of the information proposed to be released to the requesting agency. The notice shall advise the attorney that the information shall be released at the end of twenty days following mailing of the notice unless the attorney objects to the disclosure. If the attorney timely objects to the disclosure, the information shall remain confidential unless the requesting agency obtains an order from the Supreme Court requiring its release.

(n) Release Without Notice. If an agency otherwise authorized by section (l) of this rule has not obtained a waiver from the attorney to obtain nonpublic information, and requests that the information be released

without giving notice to the attorney, the requesting agency shall certify that:

(1) The request is made in furtherance of an ongoing investigation into misconduct by the attorney;

(2) The information is essential to that investigation; and

(3) Disclosure of the existence of the investigation to the attorney would seriously prejudice that investigation.

(o) Notice to National Regulatory Data Bank. The Regulation Counsel shall transmit notice of all public discipline imposed against an attorney, transfers to or from disability inactive status, and reinstatements to the National Regulatory Data Bank maintained by the American Bar Association.

(p) Duty of Officials and Employees. All officials and employees within the Office of the Regulation Counsel, the committee, the Presiding Disciplinary Judge, and the Supreme Court shall conduct themselves so as to maintain the confidentiality mandated by this rule.

(q) Evidence of Crime. Nothing in these rules except for the admission of past misconduct protected by C.R.C.P. 251.13(i) shall be construed to preclude any person from giving information or testimony to authorities authorized to investigate criminal activity.